SUPREME COURT, U.S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

Supreme Court, U.S.
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No. 596

W. A. FERRON, HENRY A. BORELLO, W. H. BUTTRAM, ROBERT H. HORNE, C. W. JENKINS, HARRY LEWIS, R. H. ROBINSON, F. E. WALTON, C. BLACK, H. COLEMAN, S. R. FRANKS, GEORGE B. SALOVICH, FRODE ANDERSEN, FRANCIS H. ROGERS, CHEMICAL BANK NEW YORK TRUST COMPANY, a New York corporation, and FIRST DOE through TENTH DOE, inclusive,

Petitioners,

vs.

LOUIS HORNER, JOHN L. CONNOLLY, VICTOR ROMERO, JAMES RIEMERS and HUGH BELL for the benefit of THE PACIFIC COAST DISTRICT OF NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, an unincorporated association,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

W. A. FERRON, HENRY A. BORELLO, W. H. BUTTRAM, ROBERT H. HORNE, C. W. JENKINS, HARRY LEWIS, R. H. ROBINSON, F. E. WALTON, C. BLACK, H. COLEMAN, S. R. FRANKS, GEORGE B. SALOVICH, FRODE ANDERSEN, FRANCIS H. ROGERS, CHEMICAL BANK NEW YORK TRUST COMPANY, a New York corporation, and FIRST DOE through TENTH DOE, inclusive,

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Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit, entered in the above entitled matter on May 24, 1966. A petition for rehearing was denied on June 30, 1966.

CITATIONS TO OPINIONS BELOW

The order entered by the District Court of the Northern District of California which was appealed to the Court of Appeals for the Ninth Circuit is not reported. It is printed in Appendix A hereto, *infra*, p. i and may be found in the record at R. Vol I, p. 145.[1]

The opinion of the Court of Appeals for the Ninth Circuit (R. Vol. I, p. 156) is printed in Appendix A hereto, *infra*, p. ii, and is reported at 362 F. 2d 224.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 24, 1966 (R. Vol. I, p. 155) and is printed in Appendix A hereto, *infra*, p. xviii. A petition for rehearing was filed on June 22, 1966 and was denied on June 30, 1966 (R. Vol. I, p. 168). The order denying a rehearing is printed in Appendix A hereto, *infra*, p. xviii. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

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[1]Citations to the record will refer to the volumes and pagenation as transmitted by the Court of Appeals.

STATUTES AND RULES INVOLVED

The statutory provisions involved are the following sections of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter referred to as LMRDA); 73 Stat. 519; Section 501, 29 U.S.C. 501; Section 501 (b), 29 U.S.C. 501 (b). Former Rule 23 (b) now Rule 23.1 as amended 1966 of the Federal Rules of Civil Procedure is also involved.

The statutes and rule involved are printed in Appendix B hereto, *infra*, p. xix *et seq.*

QUESTIONS PRESENTED

1. What does or does not constitute "good cause" for the bringing of an action under Section 501 (b) LMRDA?

2. What is the function of the District Judge in determining whether or not "good cause" exists under Section 501 (b) LMRDA?

3. Does an applicant have the burden of showing "good cause" under Section 501 (b) LMRDA or is the burden upon the prospective defendant to show the lack of it?

4. Can a Union's retirement and severance pay plan, established for its officials prior to the enactment of LMRDA, be attacked retroactively in an action thereunder?

5. Is an order denying leave to add additional parties in an action under 501 (b) LMRDA an appealable order?

6. Do the doctrines of res judicata and collateral estoppel apply to an order entered by a District Court, when no findings are required or made, where the successful litigant has advanced substantive and procedural grounds in support of the order?

7. Does the death of the only affiant to an application to file a complaint under Section 501 (b) abate or terminate the proceedings, where the death occurred prior to the filing of the proposed complaint and the deceased was the only proponent of the proposed complaint to offer evidence in its behalf on the question of "good cause"?

STATEMENT OF CASE

On April 15, 1965 the United States District Court for the Northern District of California (Harris, Chief Judge) entered an order denying respondents' application and motion to file a complaint under Section 501 (b) LMRDA. The order was entered after two hearings in the District Court where witnesses were examined under oath and affidavits were received and considered; in addition, the Court had the benefit of the record in Action No. 41678 pending before the same District Judge which involved the same subject matter. (R. Vol. I, pp. 76, 79, 112; Vols. III and IV.) The record in Action No. 41678 was before the District Court and referred to by the parties in argument, affidavit and memoranda. (e.g., R. Vol. III, pp. 2, 8; Vol. I, pp. 77, 100, 101, 102, 104, 128, 129.)

On May 1, 1959 the National Marine Engineers' Beneficial Association and certain of its subordinate associations, including Association No. 97 (hereinafter referred to as Local 97) entered into a trust agreement with the Chemical Corn Exchange Bank, a New York corporation, to provide for a retirement and severance program for its union officials known as the "MEBA Retirement and Severance Plan." (R. Vol. I, pp. 1K, 16.) On April 1, 1962, Local 97 was merged with other local labor organizations on the Pacific Coast to form a labor organization known as the Pacific Coast District of the National Marine Engineers' Beneficial Association (hereinafter referred to as the District). (R. Vol. III, pp. 28-29.) The referendum under which the District was formed provided that it would assume all the obligations of the individual locals. One of the obligations assumed was Local 97's obligation to contribute to the MEBA Retirement and Severance Plan. (R. Vol. I, pp. 30-31.) The payments made to the plan are posted quarterly as part of the District's financial report, which is subject to the approval of members of District. (R. Vol. III, p. 31.)

On August 6, 1963, three of the five respondents herein (Louis Horner, John L. Connolly and Victor Romero) filed Action No. 41678 in the District Court. (R. Vol. I, pp. 76, 99; compare captions R. Vol. I, pp. 21, 65.) The original complaint in Action No. 41678 was permitted to be filed ex parte without an opportunity afforded the named defendants to be heard in opposition to its filing. (R. Vol. II, Memo-

randum of Points and Authorities attached to appearance of the Pacific Coast District, etc., p. 10.) On December 5, 1963 the plaintiffs in Action No. 41678 filed a motion for leave to file an amended complaint. (R. Vol. II, Notice of Motion, pp. 1 *et seq.*) The purpose of the proposed amended complaint was to add two additional defendants to that action, namely: the District and the National Marine Engineers' Beneficial Association.[2] The allegations in the proposed amended complaint in Action No. 41678 were identical in substance to those in the proffered complaint which the District Court denied leave to file in this action. (R. Vol. III, p. 8, compare R. Vol. I, p. 65, *et seq.* with R. Vol. II, First Amended Complaint attached to Notice of Motion in Action No. 41678.) The District appeared in Action No. 41678 to oppose filing of the amended complaint. (R. Vol. II, Appearance of Pacific Coast District, etc.) On December 20, 1963, after argument and briefs, the District Court entered an order in Action No. 41678 denying the motion requesting leave to file the amended complaint. (R. Vol. I, p. 64-a.) No appeal was taken from that order.

On March 31, 1965, respondents sought leave to file the complaint here under consideration. (R. Vol. I, p. 74; R. Vol. III.) The only significant difference, with respect to the District, between the proposed amended complaint in Action No. 41678 and the pro-

[2]The complaint and the proposed amended complaint in Action No. 41678 also named four of the petitioners herein (W. A. Ferron, Henry A. Borello, Robert H. Horne and George B. Salovich).

posed complaint in this action, is that in Action No. 41678, the District was named as a defendant while here the proposed complaint purports to be for the benefit of the District as a plaintiff. An affidavit was filed on behalf of the District opposing the motion for leave to file the complaint herein. (R. Vol. I, p. 79.) A memorandum of points and authorities was also filed opposing the motion. (R. Vol. I, p. 99.) As indicated, two hearings were held on the motion where testimony was taken and argument made.

The evidence indicated that respondent Horner, the only person to verify the proposed complaint, was not a member in good standing of the District at the time respondents sought leave to file it. (R. Vol. IV, pp. 5-10.) There was evidence that Horner was a pensioner and not an active seaman; that respondent Romero was a real estate salesman and had not been to sea since 1954; that respondent Riemers was retired on social security and that respondent Bell was the only active seaman among respondents. (R. Vol. III, pp. 49-50.) The record also indicated that, even assuming for the sake of argument only, the MEBA Retirement and Severance Plan was improperly adopted, the plan was ratified by the membership of District. (R. Vol. III, pp. 15-17, 30-31; Exhibits A, B, C, D, E, F, G attached to affidavit of Wesley A. Ferron, R. Vol. I, p. 80.) The record also discloses that internal union remedies are available to respondents in connection with the issues they seek to raise in the proposed complaint. (R. Vol. I, p. 138.) The National MEBA Constitution is attached to the affi-

davit of W. A. Ferron in R. Vol. II as well as a copy of District's By-Laws. The By-Laws are also found in Exhibit H attached to the affidavit of Wesley A. Ferron. See also R. Vol. III, p. 43.

While the appeal was pending in the Court of Appeals, respondent Horner died.[3] The parties filed memoranda with respect to the effect of Horner's death on the appeal at the Court's request. Petitioners contended that the appeal had become moot because the application to file the complaint was only verified by Horner, and therefore an order permitting such complaint to be filed would deprive petitioners of the benefit of the verification provision of Section 501 (b) LMRDA. Respondents contended that the appeal had not become moot.

The Court of Appeals reversed the order of the District Court. It held that the appeal was not moot; that in determining whether "good cause" exists for permitting a complaint to be filed under Section 501 (b) LMRDA, the District Court cannot consider defenses involving disputed questions of fact; that the proposed defendants opposing the filing of a complaint under Section 501 (b) have the burden of showing lack of good cause by "undisputed affidavit"; that the order denying the motion to file an amended complaint in Action No. 41678 (which involved the same subject matter as here and which there sought to add the District as an additional party) was not an appealable order and that, even assuming such

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[3]Subsequently, while the appeal was still pending, the appellee Robinson also died.

order was appealable, the doctrines of res judicata and collateral estoppel, would not apply to prevent the filing of the proposed complaint herein.

REASONS FOR GRANTING A WRIT

This case raises serious questions of interpretation of LMRDA and the procedures to be followed under Section 501 (b) LMRDA which have not yet been resolved by this Court. Because of their importance generally and particularly in the field of labor law and legislation, these matters should be decided by the United States Supreme Court. Petitioners contend that the Court of Appeals erroneously decided these important questions and that it also erroneously decided questions of general law contrary to decisions of this Court.

1. The decision of the Court of Appeals erroneously construes Section 501 (b) LMRDA. Section 501 (b) LMRDA provides that no proceeding thereunder "shall be brought except upon leave of Court obtained upon verified application and for good cause shown, which application may be made ex parte." Section 501 (b) sets up a screening procedure before a complaint may be filed thereunder. This procedure requires a verified application which is a more rigorous prerequisite than generally required in civil actions in Federal Courts. (Fed. Rules Civ. Proc. Rule 11.) Section 501 (b) provides that the verified application to file the proposed complaint may be

made ex parte. Where Courts have permitted ex parte filings, the question of "good cause" has been considered in adversary proceedings on motions to dismiss. (*Perscio v. Daley* (S.D., N.Y., 1965) 239 F. Supp. 629; *Holton v. McFarland* (D. Alaska, 1963) 215 F. Supp. 372; *Penuelas v. Moreno* (S.D. Cal., 1961) 198 F. Supp. 441; *Smith v. General Truck Drivers, Etc. Union Local No. 467* (S.D. Cal., 1960) 181 F. Supp. 14.) In this case, the application was made on a noticed motion and adversary proceedings were held. Where an adversary proceeding is held, conflicts in facts may arise. The Court of Appeals, in its decision states:

> "At such a hearing, if one is called, the court may, if it chooses, **look somewhat beyond the complaint** in determining whether the plaintiff has made the 'good cause' showing required by section 501 (b). Thus if the defendant can establish, **by undisputed affidavit**, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or that the action cannot succeed because of the application of the principles of *res judicata* or collateral estoppel, or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application." (362 F. 2d at p. 229, Appendix A, p. ix, Emphasis added.)

The Court of Appeals does not indicate how far beyond the record "**somewhat**" is, and this portion of its holding restricts the function of the District Judge

contrary to the plain meaning of Section 501 (b) LMRDA and previous decisions delineating the function of a trial judge in determining good cause. Furthermore, the portion of the opinion of the Court of Appeals above set forth shifts the burden of showing good cause from the applicant and requires the prospective defendant to show lack of good cause by "undisputed affidavit".

Congress has not defined "good cause" in Section 501 (b) or in any other part of the LMRDA. Normally, the question of "good cause" is one addressed to the sound discretion of the trial Court:

> "And in passing upon whether the trial court acted within its judicial discretion, we must interpret every intendment in favor of the legality of the court's action." (*Los Angeles Jr. D. & M. Exch. v. Securities & Exch. Com'n* (9th Cir. 1960), 285 F. 2d 162, cert. denied, 366 U.S. 919, 81 S. Ct. 1095, 6 L. Ed. 2d 241.)
>
> "In a second sense, and the one most commonly meant in the use of the word in the law, 'discretion' is defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court. 1 Bouv. Law Dict., Rawles' Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set aside on an appeal except when there is an abuse of discretion. . . . If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its

discretion." (*Delno v. Market St. Ry. Co.* (9th Cir. 1942) 124 F. 2d 965, 967.)

See also:

Edsberg v. Local Union No. 12 of Int. U. of Operating Eng. (9th Cir. 1962) 300 F. 2d 785;

Highway Truck Drivers & Helpers, Etc. v. Cohen (3rd Cir. 1960) 284 F. 2d 162, cert. denied 365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744.

One element of "good cause" is whether the applicant has exhausted his internal union remedies. In *Penuelas v. Moreno* (S.D., Cal., 1961) 198 F. Supp. 441, the Court considered this aspect of "good cause" and stated:

> "In addition to the requirements heretofore discussed the plaintiff, in an action under Section 501 (b) in the Federal court must show 'good cause'. There is nothing in the section which defines 'good cause' nor can the section be read as meaning that the requirement of good cause is satisfied merely by the demand for court action referred to above. If this is what Congress had intended it could have omitted the reference to 'good cause'. 'Good cause' must therefore mean something in addition to the demand and the refusal referred to above.
>
> "Congress desired to protect the rights of members in labor unions; Congress without question was familiar with the great bulk of litigation in the courts of the States and of the United States. It is unbelievable that Congress intended

that all a Union member had to do before filing an action under Section 501 (b) was to make a demand upon his union for court action in some matter concerning monies or the property of the union, such as is described in Section 501 (a); and then upon the mere failure or refusal of the union to sue, that such member would be immediately entitled to bring an action in the State or Federal Court for relief. It was undoubtedly this thinking which motivated insertion of the words 'for good cause shown'".

Penuelas held that "good cause" under Section 501 (b) had not been established where it had not been shown that plaintiff had exhausted his internal union remedies. There is a conflict of authority with *Penuelas*. The Court of Appeals for the Ninth Circuit previously considered this conflict in *Edsberg v. Local Union No. 12 of Int. U. of Operating Eng.* (9th Cir. 1962) 300 F. 2d 785. *Edsberg* held that whether exhaustion of internal remedies was an *absolute* requirement or not, it could be considered in determining whether "good cause" existed:

"We need not decide whether exhaustion of remedies provided by the Union is an absolute requirement before asking the federal courts to intervene in intra-union activities. *Penuelas v. Moreno*, S.D. Cal. 1961, 198 F. Supp. 441; *Acevedo v. Bookbinders & Machine Operators Local No. 25*, S.D. N.Y., 1961, 196 F. Supp. 308; *Smith v. General Truck Drivers, Union Local 467*, S.D. Cal. 1960, 181 F. Supp. 14; *Holderby v. International Union of Operating Engineers, Local Union No. 12*, 1955, 45 Cal. 2d 843, 291 P. 2d 463; *But Cf. De-*

troy v. American Guild of Variety Artists, 2 Cir. 1961, 286 F. 2d 75.

"We find here no uncertain or futile remedy offered to appellants by their own organization. In the absence of such a factual situation, we recognize and reaffirm 'the declared policy [of the courts] favoring self regulation by unions,' *Detroy v. American Guild of Variety Artists,* supra at 81." (*Edsberg v. Local Union No. 12 of Int. U. of Operating Eng.* (9th Cir. 1962) 300 F. 2d 785, 787, 788.)

In the present case, there was evidence upon which the District Court could have found that respondents had not exhausted their internal union remedies and found that "good cause" had not been established. The record indicates that respondents could (1) request the membership not to approve appropriations for the MEBA Retirement and Severance Plan; (2) request the District Executive Committee to submit a referendum on the issue; (3) bring the matter to the National Executive Committee and (4) bring charges against the officials of District. (R. Vol. I, p. 138.) The National MEBA Constitution is attached to the affidavit of W. A. Ferron in R. Vol. II as well as a copy of District's By-Laws. The By-Laws are also found in Exhibit H attached to the affidavit of Wesley A. Ferron. (R. Vol. I, p. 80.)

However, the Court of Appeals in reversing the District Court herein ignored its previous holding in *Edsberg* and refused to let the District Court consider the question of exhaustion of internal remedies in considering good cause. The Court stated

"It is a condition precedent to a suit under section 501 (b), that the plaintiff, as a member of the labor organization, request that organization or its governing board or officers to sue or recover damages or secure an accounting or other appropriate relief from the asserted violations of fiduciary duties defined in section 501 (a). The proposed complaint alleges fulfillment of this condition precedent. Section 501 (b) makes reference to no other intra-organizational remedies which must be pursued. It follows that the pursuit of other internal remedies which may be available need not be alleged to show 'good cause' or proved to prevail on the merits. See: *Holdeman v. Sheldon,* S.D. N.Y., 204 F. Supp. 890, 896, *aff'd,* 2 Cir., 311 F. 2d 2." (362 F. 2d at p. 231, Appendix A, p. xiv.)

In the District Court and in the Court of Appeals, petitioners contended that, aside from the question of exhausting internal remedies, there was evidence in the record upon which the District Judge could have found lack of "good cause".[4] If there is anything in the record to sustain the order of the District Court, the Court of Appeals should have affirmed the order:

"A successful party in the District Court may sustain its judgment on any ground that finds support in the record." (*Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S. Ct. 307, 308, 1 L. Ed. 2d 314,

[4]The opinion of the Court of Appeals incorrectly states that some of these points were raised for the first time on appeal. (362 F. 2d at p. 232, App. A, p. xvii.) This is not correct, and the misstatement was called to the attention of the Court of Appeals in petitioners' Petition for Rehearing.

cert. denied, 355 U.S. 835, 78 S. Ct. 55, 2 L. Ed. 2d 46.)

Town of South Tucson v. Tucson Gas, Electric & Pow. Co. (9th Cir. 1945) 149 F. 2d 847, 848;

Aetna Insurance Company v. Eisenberg (8th Cir. 1961) 294 F. 2d 301, 308.

Furthermore, the District Court heard testimony before denying respondents leave to file the proposed complaint. Insofar as the District Court's order rests upon conflicting testimony or the credibility of witnesses it is unassailable.

Adamson v. Gilliland, 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356, 357-358;

Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F. 2d 77, 80;

Petition of J. E. Brenneman Company (3rd Cir. 1963) 322 F. 2d 846, 852.

Petitioners contend that lack of "good cause" was shown because respondents did not comply with Rule 23 (b) (now Rule 23.1) Federal Rules of Civil Procedure. The Court of Appeals erroneously held that Rule 23 (b) was not applicable to a proceeding under Section 501 (b) LMRDA. (362 F. 2d 231, Appendix A, p. xvi.) The LMRDA, as enacted by Congress was essentially the bill enacted by the House of Representatives. Section 501 of the LMRDA was derived from a previous bill introduced by Representative Elliott. (*Nelson v. Johnson* (D. Minn. 1963) 212 F. Supp. 233, 285, aff'd 325 F. 2d 646.) On August 11, 1959 Mr. Bowling of Missouri made a speech

which he said was "a report of a good friend of all of us, the gentleman who introduced the Committee bill, the Honorable Carl Elliott of Alabama". He went on to state that Mr. Elliott felt that "Section 501 (b) provides that if the union fails to bring suit upon the request of the member, the member may apply to any state or federal Court for leave to bring an action on behalf of the organization *similar to a minority stockholders' suit against a corporation*". Emphasis added. (Legislative History of The LMRDA of 1959, Vol. II, pp. 1583, 1586.)

Former Rule 23 (b) now Rule 23.1 of the Federal Rules of Civil Procedure deals with class actions. Petitioners contended that the proposed complaint did not meet the requirements of the rule. (R. Vol. I p. 110.) Rule 23 (b) refers to "an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it. . . ." Respondents, by attempting to file the proposed complaint "for the benefit of The Pacific Coast District of National Marine Engineers' Beneficial Association, an unincorporated association" (R. Vol. I, p. 65) come within the purview of Rule 23 (b). That rule also provides that:

> "The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

The District Court had before it the Constitution of the National MEBA and the District's By-Laws, which indicated that internal union remedies were available to respondents. The District Court could properly conclude that the general allegations in paragraph VIII of the proposed complaint (R. Vol. I, p. 68) did not meet the requirements of Rule 23(b).[5] The District Court, in exercising its discretion on whether good cause for filing the proposed complaint existed, could also have found that failure to conform to Rule 23 (b) indicated a lack of good cause.

Petitioners contend that there was evidence in the record upon which the District Court could have found lack of "good cause" for the following reasons:

A. The Respondent Who Verified the Proposed Complaint and Filed Supporting Papers Was Not a Member in Good Standing of the District and Only One Alleged Respondent Was an Active Seaman.

The only material offered on the merits to support the proposed complaint was the declaration and affidavit of respondent Louis Horner.[6] (R. Vol. I, pp. 76, 112.) Horner was the only respondent to verify the complaint. (R. Vol. I, p. 70.) Section 501 LMRDA provides for actions by a *member* of a labor organi-

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[5]If respondents had alleged what they had done with particularity, they would have necessarily disclosed, among other things, the votes of the District membership at the various Branch meetings, adverse to their contentions ratifying the MEBA Retirement and Severance Plan, even if initial improper adoption were to be assumed arguendo.

[6]Counsel for respondents filed a declaration, not dealing with the merits, with respect to respondents' ex parte request to file the proposed complaint. (R. Vol. I, p. 72.)

zation. There was evidence that respondent Horner was not a member in good standing of District at the time respondents sought leave to file the proposed complaint. (R. Vol. IV, pp. 5-10.) It must be assumed that the District Court found that he was not a member of District at the time leave to file the proposed complaint herein was sought. Since Horner was the only respondent to verify the complaint a proper verified complaint was not before the District Court. Also, since Horner's declaration and affidavit were the only items offered by respondents to show good cause in support of the proposed complaint, the District Court did, in its discretion, find that good cause had not been established. (See *Perscio v. Daley* (S.D. N.Y. 1965) 239 F. Supp. 629.)

Furthermore, even if it be assumed, for argument only, that Horner was a member of the District when leave was sought to file the complaint, the record shows that he was a pensioner and not an active seaman; that respondent Romero was a real estate salesman and had not been to sea since 1954; that respondent Connolly was a pensioner; that respondent Riemers was on Social Security; and that Bell was the only active seaman among respondents. (R. Vol. III, pp. 49-50.) In addition, the record indicates that respondent Bell did not make any prior demand requesting union action with respect to this matter. (Exhibits C, D, E, F, and G attached to affidavit of Wesley A. Ferron, R. Vol. I, p. 80.) Therefore, Bell is not a proper party plaintiff in the proposed complaint. (*Perscio v. Daley, supra.*) In

these circumstances the District Court could conclude that good cause was not shown for these respondents to file the proposed complaint.

B. The MEBA Retirement and Severance Plan Was Properly Adopted.

Respondents attack the MEBA Retirement and Severance Plan on the ground that it was entered into on May 1, 1959 without any valid authorization. (R. Vol. I, p. 67.) Horner's affidavit in Action No. 41678 indicates the passage of Resolution No. 327 by Local 97 on July 5, 1957. (R. Vol. I, p. 24.) A copy of Resolution 327 was attached. (R. Vol. I, p. 29.) It is respondent's contention that since the resolution uses the words "retirement program" the *severance* portion of the MEBA Retirement and Pension Plan was not authorized. However, the District Court could properly conclude, from modern common experience, that the terms "retirement program" and "retirement plan" encompassed the severance portion of the plan.

> "From modern common experience, it is known that one pension plan may take care of the pensioner himself. Another plan specifically takes care of the pensioner's widow or perhaps minor children in addition to the pensioner." (*Ulmann v. Sunset-McKee Company* (9th Cir. 1955) 221 F. 2d 128, 132.)

C. Even If It Be Assumed, for the Sake of Argument Only, That the MEBA Retirement and Severance Plan Was Not Properly Adopted, the Plan Was Duly Ratified by the Members of the District.

If it be assumed arguendo that the MEBA Retirement and Severance Plan was not properly adopted,

it was duly ratified by the District membership. The doctrine of ratification was aptly stated by Lord Eldon:

> "It is established by all the cases that if the *cestui que trust* joins with the trustees in that which is a breach of the trust, knowing the circumstances, such a *cestui que trust* can never complain of such breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees. . . ." (*Walker v. Symonds*, 3 Swanst. 2, 64.)

> "After a breach of trust has occurred, a beneficiary may expressly or impliedly express satisfaction with the act and thereby prevent himself from claiming thereafter that it was illegal. This transaction is sometimes described by the name 'ratification,' or 'confirmation,' or 'acquiescence.' Its essence is that the beneficiary unequivocally declares that he does not regard the act in question as a breach of trust but rather elects to treat it as a lawful transaction under the trust. He has the election of disaffirming the transaction or of accepting it.

Ratification binds a successor trustee acting for the beneficiary in making a claim against a predecessor trustee, and also successors in ownership of the beneficiary's interest. A successor trustee may act for the beneficiary in ratifying an act of a predecessor trustee.

Ratification may occur by an express statement of the attitude of the beneficiary, as, for example, by a verbal statement to the trustee, or by an informal or written document delivered to the trustee, or ratification may be implied from the

conduct of the cestui, as, for example, from the acceptance of the results or benefits from the act in question, without a claim that there had been a breach.

It would seem that there need be no consideration for ratification, although it sometimes does exist. The doctrine of ratification is applied in the law of principal and agent, master and servant, and corporations. An otherwise unlawful or unauthorized act may be validated after it has been performed." (Bogert, Trusts and Trustees, § 942.)

Phillips v. Sanger Lumber Co. (Sup. Ct. Cal. 1900) 130 Cal. 431, 62 Pac. 749;

Petray v. First Nat. Bank (D.C.A. Cal. 1928) 92 Cal. App. 86, 267 Pac. 711;

In Re Marble (Sup. Ct. Me. 1938) 136 Me. 52, 1 A.2d 355;

Coulter Estate (Sup. Ct. Pa. 1954) 379 Pa. 209, 218, 108 A.2d 681;

Wilbur's Estate (Sup. Ct. Pa. 1938) 334 Pa. 45, 55, 5 A.2d 363.

The District's By-Laws provide that:

"A majority vote of the membership shall be authorization for any Union action, unless otherwise specified in the National Constitution or these By-Laws." (By-Laws of Pacific Coast Dist., Art. I, Exhibit H attached to affidavit of Wesley A. Ferron, filed on March 31, 1965, R. Vol. I, p. 80, also found in R. Vol. II attached to affidavit of Wesley A. Ferron.)

The District's By-Laws also provide that:

"When applicable to the District as a whole, the term 'majority vote of the membership' shall

mean the majority of all the valid votes cast by members at an official meeting of those branches holding a meeting. This definition shall prevail, notwithstanding that one or more Branches cannot hold meetings because of no quorum."[7] (By-Laws of Pacific Coast Dist., Art. XX, Sec. 3, Exhibit H attached to affidavit of Wesley A. Ferron, C.T. 80, also in Supp. C.T. attached to affidavit of Wesley A. Ferron.)

The District has branches in San Francisco, California; Seattle, Washington; Portland, Oregon; Wilmington, California and Honolulu, Hawaii. District Headquarters is in San Francisco. (By-Laws of Pacific Coast Dist., Art. III, Sec. 2, *supra.*) The minutes of the meeting of the District's San Francisco Branch on February 11, 1965, indicate that 188 members were present and that the following occurred:

"Motion by V. Romero, seconded by L. Horner: 'I move that the Pacific Coast District instructs its officers to file suit to recover the funds paid by the District to the M.E.B.A. Officers' Retirement and Severance Plan on behalf of the various officers of the District. I so do move because these funds were paid into the Officers' Retirement and Severance Plan as a result of violations by the Officers of fiduciary duties to the Union and its members under the law of California, and also under Section 501 (a) of the Federal Labor Management Reporting and Disclosure Act of 1959'. The Chair stated that the motion was similar to

[7]The Court of Appeals in its decision disregards this provision and states that "No District-wide vote specifically referring to the Severance Plan has ever been taken." (362 F. 2d at p. 230, Appendix A, p. xiii.)

the one presented a year previously. Vote on motion, 7 for, 95 against, motion lost." (Exhibit D attached to affidavit of Wesley A. Ferron, R. Vol. I, p. 80.)

A similar motion by Horner had been presented at the December 5, 1963 meeting of the San Francisco Branch and was defeated 59-21. (R. Vol. IV, pp. 12-13; Exhibit C attached to affidavit of Wesley A. Ferron, R. Vol. I, p. 80; Exhibit attached to affidavit of W. A. Ferron, R. Vol. II.) Horner admitted that he was not in any way prevented from speaking on his motion in the open union meeting. (R. Vol. IV, p. 13.)

The minutes of the District's Wilmington Branch for February 8, 1965 indicate that 60 members were present and that the following occurred:

"The Chair read a letter dated January 27, 1965 from Brother Louis Horner to the District Executive Committee of the M.E.B.A., Pacific Coast District, to take such action as may be necessary to recover all contributions paid by the District to the National M.E.B.A. Retirement and Severance Fund. Brother John Connolly read a prepared motion as follows:

'I move that the Pacific Coast District instruct its officers to file suit to recover the funds paid by the District to the M.E.B.A. Officers' Retirement and Severance Plan on behalf of the various officers of the District. I do so move because these funds were paid into the Officers' Retirement and Severance Plan as a result of violations by the officers of fiduciary duties to the union and its members under the

law of California, and also under Section 501(a) of the Federal Labor Management Reporting & Disclosure Act of 1959.

'This action must be taken prior to the regular meeting at San Francisco, March 11, 1965.

'/s/ John L. Connolly.'

"The motion was seconded by Brother Andrew DiMiceli.

"Brother Connolly answered a question about the time limit in the last sentence of the motion. Brother Horner made a few remarks about the reason for the motion. Various brothers expressed themselves. President Ferron took the floor and made a statement about the Plan and the fact that all newly elected officials had their choice between the MEBA-PMA Pension Plan or the MEBA Retirement and Severance Plan, but not both, and that there were various instances where the members had received severance payments when their ships were sold foreign.

"After President Ferron spoke, Brother Horner asked again for the floor to give, as he stated, 'his rebuttal.' President Ferron challenged Brother Horner because he had previously spoken a couple of times. The issue was decided by the members who voted in a majority to let Brother Horner continue speaking.

"After Brother Horner finished speaking, President Ferron took issue with some statements made by Brother Horner.

"Brother Pelick moved the previous question, seconded by Brother John DerBoghosian. It was explained by the Chair that this would stop debate and place the original motion on the floor

for a vote. A vote was taken on Brother Pelick's motion and by a show of hands there was no opposing votes, so Brother Connolly's motion was put to a vote. The Tellers counted 4 for the motion and 20 opposed to the motion. The motion lost." (Exhibit E attached to affidavit of Wesley A. Ferron, R. Vol. I, p. 80.)

The minutes show and Horner admits that he spoke in support of his resolution at Wilmington. (R. Vol. IV, p. 15.) The minutes of the District's Seattle Branch for March 10, 1965 indicate that 54 members were present and that the following occurred:

"The minutes of San Francisco, Wilmington and Portland were read. No meeting was held in Honolulu last month due to lack of a quorum. Brother Salovich re-read the motions made by Brother Connolly in Wilmington and Brother Romero in San Francisco re the MEBA Officers' Retirement & Severance Plan. Motion was made by Brother F. E. Walton, seconded by Brother Axel Edblad to approve the minutes of the other ports as read, and to concur with the action of the membership in San Francisco and Wilmington in rejecting the motion of Brothers Connolly and Romero re MEBA Officers' Retirement & Severance Plan. Motion carried, 42 FOR; 0 AGAINST." (Exhibit F attached to affidavit of Wesley A. Ferron, R. Vol. I, p. 80.)

The minutes of the District's Portland Branch for March 9, 1965 indicate that 11 members were present and that the following occurred:

"Unfinished Business and Minutes of other Ports: Minutes of Wilmington Branch of February 8,

1965 were read, minutes of Seattle Branch of February 10, 1965 were read and minutes of San Francisco of February 11, 1965 were read. The Chair called attention to the Motion by Brother John L. Connolly, re: MEBA Retirement and Severance Fund, in the Wilmington minutes and the Motion by Brother V. Romero, re: MEBA Retirement and Severance Fund, in the San Francisco minutes. After discussion it was moved by Brother Geo. Miller and seconded by Brother J. F. Yarger that the minutes of Wilmington, Seattle and San Francisco be approved as read, and that the Motions of Brothers Connolly and Romero be rejected. Vote on Motion, 10 for, 0 against. Motion Carried."

As indicated, the Honolulu Branch had no meeting in February because of lack of a quorum.

The record also indicates that on December 18, 1963 the District's Executive Committee adopted the following resolution:

"Moved and seconded that the PCD make contributions on full time paid officials of PCD to MEBA-PMA Pension Plan who are not covered by the Union Retirement Severance Plan and who have not established twenty (20) years credits under the MEBA-PMA Pension Plan. Adopted." (Exhibit A attached to affidavit of Wesley A. Ferron, R. Vol. I, p. 80.)

The minutes of the January 9, 1964 meeting of the San Francisco Branch indicate that 198 members were present and that the actions taken by the Executive Committee, including the one set forth above,

were approved by a vote of 64-2. (Exhibit B attached to Affidavit of Wesley A. Ferron, R. Vol. I, p. 80.)

In addition, the District payments to the MEBA Retirement and Severance Plan are included in quarterly financial statements which are voted on and approved by the members of the District. (R. Vol. III, pp. 40-42.)

All the alleged facts, upon which appellants rely were contained in a report of a committee, of which Horner was a member, made during July of 1961. (R. Vol. I, pp. 22, 26, 63.) The record indicates that Horner has not been impeded from asserting his views and presenting motions against the MEBA Retirement and Severance Plan at union meetings. Yet, with Horner's version of the facts before them, the members of District have, on every occasion, voted in favor of the plan. If the members of District believed that the plan was unauthorized or that they did not wish it to be continued they would not continue to vote money for payments and they would have voted for Horner's resolution. It is clear that the various votes by the members of the District cited above, with full disclosure and open discussion before the membership, clearly constituted ratification of the MEBA Retirement and Severance Plan, even assuming arguendo that the plan was not properly authorized in its inception.

2. The Court of Appeals erroneously held that the LMRDA could be used to attack events which occurred prior to its enactment.

The primary purpose of the action sought to be filed by respondents is to attack the MEBA Retirement and Severance Plan, which was established on May 1, 1959, prior to the time the LMRDA became effective. The plan is attacked under the guise of challenging current payments, but it is the acts which occurred prior to the effective date of LMRDA which are alleged to be the improper basis for the current payments. The decision of the Court of Appeals holds that the LMRDA is not retroactive but holds that current payments can be attacked. (362 F. 2d at p. 232, Appendix A, p. xvii.) The effect of this erroneous holding is to permit challenge of any union pension or severance program no matter how long it has been in existence and without regard to individual rights which have vested over many years. Furthermore, where, as here, there is a merger of labor organizations or companies having pension and severance plans, the holding of the Court of Appeals exposes the successor entity to the possibility of lawsuits over matters long stale or thought to be settled. All the events relating to the adoption of the MEBA Retirement and Severance Plan occurred on or before May 1, 1959. If the plan were improperly adopted, the cause of action accrued on that date. (*Conlin v. United States* (Ct. Cl. 1956) 146 F. Supp. 833, 835, cert. den. 353 U.S. 916, 77 S. Ct. 663, 1 L. Ed. 2d 663.) It has been held that in the case of pension plans that rights dealing with periodic payments are continuing ones only after the basic right has been established.

> ". . . Before plaintiff can claim these periodic payments, however, she must establish her right

to a pension. . . . An action to determine the existence of the right thus necessarily precedes and is distinct from an action to recover installments which have fallen due after the pension has become granted.

"A cause of action accrues when a suit may be maintained thereon. . . ." (*Dillon v. Board of Pension Commrs.*, (Sup. Ct. Calif. 1941) 18 Cal. 2d 427, 430, 116 P. 2d 37, 39.)

See also:

Santa Cruz, etc. Cement Co. v. Young (D.C.A. Calif. (1943) 56 Cal. App. 2d 504, 507, 133 P. 2d 32, 33.

These allegations in the proposed complaint refer back to the original act of adopting the plan, and the District Court had no jurisdiction to inquire into the plan which was in effect prior to the LMRDA.

3. The Court of Appeals erroneously held that an order denying a motion to bring in additional parties defendant in an action under Section 501 (b) LMRDA was not an appealable order. The Court held:

"In any event, denial of the motion to file the amended complaint, made in Action No. 41678 which is still pending, was not a final and appealable order. See *Hancock Oil Co. v. Universal Oil Products Co.*, 9 Cir. 120 F. 2d 959, 960; *National Machinery Co. v. Waterbury Farrel Foundry and Machine Co.*, 2 Cir., 290 F. 2d 527, 528. Since the denial of that motion might yet be overturned in a future appeal in Action No. 41678 (unless rendered moot by the present proceed-

ings) that unreviewed order of denial could hardly serve as *res judicata* or work a collateral estoppel in this case." (362 F. 2d at p. 229-230, Appendix A, p. xii.)

Petitioners contend that this holding is contrary to the decisions of this Court in *Mercantile National Bank v. Langdean,* 371 U.S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523; *Hudson Distributors v. Eli Lilly,* 377 U.S. 386, 389, fn. 4, 84 S. Ct. 1273, 1276, fn. 4, 12 L. Ed. 2d 394, 397, fn. 4; *Chapman v. Sheridan-Wyoming Co.,* 338 U.S. 621, 70 S. Ct. 392, 94 L. Ed. 393. The following examples illustrate the erroneousness of the holding of the Court of Appeals:

Example 1: X, a union member, attempts to bring an action under Section 501 (b) LMRDA against A and B who are union officials. X presents to the District Court a verified application seeking to file the proposed complaint against A and B. A contested hearing is held either on a motion to file the proposed complaint or on a motion to dismiss and the trial Court enters an order permitting the complaint to be filed only as to A. B is ordered deleted as a party defendant. The action goes to trial. X prevails on the merits and obtains a judgment against A for everything prayed for in the complaint. How can X appeal? He does not contest the judgment against A. Furthermore, assuming for the sake of argument only, that X could in an appeal from his judgment against A appeal from the order deleting B as a defendant. What relief could he be granted? Since B did not participate in the trial below, the judgment

against A could not be made to apply to B. The only relief which could be granted is that another trial could be ordered between X and B. Duplicate trials would result, contrary to modern rules of joinder which seek to have controversies resolved in one action rather than numerous ones. If, as petitioners contend, the order refusing leave to file the complaint against B is appealable, a successful appeal from the order would result in a single trial adjudicating all the issues between X, A and B, thereby saving the time and expense for the Court, witnesses and parties.

Example 2: X, a union member, attempts to bring an action under Section 501 (b) LMRDA against A and B who are union officials. Since the LMRDA contains no limitation period, the District Court in which the action is brought must apply the analogous statute of limitations in the state which it is sitting. (*Cope v. Anderson,* 331 U.S. 461, 67 S. Ct. 1340, 91 L. Ed. 1602; *McClaine v. Rankin,* 197 U.S. 154, 25 S. Ct. 410, 49 L. Ed. 702; *Burnham Chemical Co. v. Borax Consolidated* (9th Cir. 1948) 170 F. 2d 569, cert. denied, 336 U.S. 924, 69 S. Ct. 655, 93 L. Ed. 1086, rehearing denied, 336 US. 955, 69 S. Ct. 878, 93 L. Ed. 1109, motion denied 337 U.S. 961, 69 S. Ct. 1529, 93 L. Ed. 1760.) Assume for the purpose of this example that a three year statute of limitations is involved. X discovered the facts upon which he seeks to bring the action on January 1, 1962. He seeks, without avail, internal union relief for the period of one and one-half years. He presents a verified application seeking leave to file a complaint under Section

501 (b) of LMRDA against A and B in July of 1963. In August of 1963 an adversary hearing is held on the application and the District Court permits the complaint to be filed only against A. The complaint is filed on September 1, 1963. Discovery is had by the parties. A memorandum to set the cause for trial is filed by A on February 1, 1964. The case is tried in August of 1964 and is taken under submission. The Court enters its judgment on October 1, 1964. X appeals from the judgment and seeks to challenge the order denying leave to file the complaint against B. The Court of Appeals enters a judgment some time after January 1, 1965 reversing the order. Since no complaint had yet been filed against B, the three year statute of limitations has run against X's claim and the order permitting it to be filed is of little benefit to X, who will be met by a successful defense by B.[8]

4. The Court of Appeals, contrary to decisions of this Court, erroneously held that when a District Court enters an order, where no findings are required

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[8]While it could be argued that presentation of the verified application tolls the running of the statute of limitations, there is nothing in Section 501 (b) LMRDA which indicates that this constitutes a filing of an action sufficient to prevent the running of the statute. The Court of Appeals, in the present case, when reversing the order of the District Court held that the complaint had not yet been filed, and did not relate the prospective filing back to the date of the presentment of the verified application. The Court of Appeals stated in footnote 3 that "it has been brought to our attention that subsequent to the oral argument of the appeal of this action, Mr. Ray Robinson, one of the defendants, died. Presumably, appellants will make an appropriate amendment to their complaint before it is filed, omitting this party."

or made, and the successful litigant asserted both substantive and procedural grounds, in support of the order, the doctrines of res judicata and collateral estoppel do not apply. The Court stated:

"We assume for present purposes that the identity of parties and subject matter was sufficient to give application to the doctrine of *res judicata* or collateral estoppel. Several grounds were urged upon the court in Action No. 41678 why the motion to file the amended complaint should be denied. That court appears not to have stated, in its order of denial, which of these grounds it was relying upon. This being the case, that order cannot be taken as *res judicata* as to any of the grounds urged. See *Scrofani v. Miami Rare Bird Farm, Inc.*, 5 Cir. 208 F. 2d 461, 464. For the same reason, such an order cannot work a collateral estoppel.

"Moreover, one of the grounds urged upon the court for denying leave to file the amended complaint in Action No. 41678 was that appellants had not alleged that they had made the preliminary request of union officials to take remedial action, as required by section 501 (b). Counsel for appellees thought this was probably the basis of the district court order.[9] This is a procedural

[9] At the first hearing on the instant application, counsel for appellees advised the court:

". . . I might state to the Court, when the matter came up initially, one of the reasons stated in opposition to permission to file the amended complaint was that at that time they had made no demand upon the union for action. In addition, there were four other matters which were pointed out to the Court which the Court did not reach at that time and they were that they did not exhaust their administrative remedies in the union itself.'" (362 F. 2d at p. 230, Appendix A, p. xii.)

ground which is capable of correction. If this was actually the ground on which the motion to file the amended complaint was denied it could not, by operation of the doctrine of *res judicata* or collateral estoppel, prevent appellants from correcting the procedural mistake in a subsequent and independent action, and this they have done. See *Bland v. Connally,* D.C. Cir. 293 F. 2d 852, 855."

The District Court could have decided the motion in Action No. 41678 on substantive grounds advanced by petitioners, or by the Court itself. (*Perscio v. Daley, supra,* at p. 632. *Bland v. Connally* (D.C. Cir.) 293 F. 2d 852, cited by the Court of Appeals deals with a ruling held to be procedural and is not in point. *Scrofani v. Miami Rare Bird Farm, Inc.* (5th Cir.) is in conflict with the *United States v. Munsingwear, Inc.,* 340 U.S. 36, 71 S. Ct. 104, 95 L. Ed. 36 and *Angel v. Bullington,* 330 U.S. 183, 190, 67 S. Ct. 657, 661, 91 L. Ed. 832, 837.

5. The Court of Appeals erroneously held that the death of respondent Horner did not abate or terminate the action or render the cause moot (362 F. 2d at p. 228, App. A, p. vi). As indicated, Horner was the only respondent to verify the application for leave to file the proposed complaint and the only material offered on the merits to support the filing of the complaint was his declaration and affidavit. In civil actions brought in Federal Courts "except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by af-

fidavit". (Fed. Rules Civ. Proc., Rule 11; *Frank R. Jelleff, Inc. v. Braden* (D.C. Cir., 1956) 233 F. 2d 671, 675; *Albert Dickinson Co. v. Mellos Peanut Co.* (7th Cir., 1950) 179 F. 2d 265, 268.) Thus, where a verification is required, it is because of a strong public policy on the subject. Section 501 (b) of LMRDA provides that "no such proceeding [thereunder] shall be brought except upon leave of the Court obtained upon verified application and for good cause shown. . . ." Congress has, therefore, established two prerequisites for obtaining leave of Court to file a complaint under Section 501 (b): (1) a preliminary showing of good cause and (2) the filing of a verified application. The requirement of a verified application under Section 501 (b) establishes a public policy to require an applicant thereunder to confirm the authenticity of the facts alleged under penalty of perjury.

> "A verification is an affidavit of the truth of the matter stated [citations omitted]. Its object is to assure good faith in the averments or statements of a party. The chief test of the sufficiency of a verification is whether it is so clear and certain that an indictment for perjury may be sustained on it if false [citations omitted]."
>
> *Sheeley v. City of Santa Clara* (D.C.A. Cal. 1963) 215 Cal. App. 2d 83, 85, 30 Cal. Rptr. 121, 123;
>
> *Herbert v. Roxana Petroleum Corporation* (D.C.E.D., Ill. 1926) 12 F. 2d 81, 83.

A false verification subjects the maker to prosecution for perjury.

18 U.S.C. §1621;

Butler v. McKey (9th Cir., 1943) 138 F. 2d 373, 377.

It has been held that failure to comply with the provisions of Section 501 (b) is grounds for dismissing an application or complaint attempted to be brought thereunder. (*Addison v. Grand Lodge of International Assn. of Machinists* (9th Cir., 1963) 318 F. 2d 504; *Perscio v. Daley* (S.D.N.Y., 1965) 239 F. Supp. 629; *International Brotherhood of Teamsters v. Hoffa* (D.C.D.C., 1965) 242 F. Supp. 246, 250.) The requirement for strict compliance with Section 501 (b) and requirement of verification thereunder evidences a Congressional intent to prevent harassment of union officials under LMRDA by requiring prospective litigants to make their allegations under penalty of perjury. As a result of the holding of the Court of Appeals, petitioners are compelled to respond to a complaint based upon the verified application of a dead man, who could not be held accountable, if necessary, for the allegations therein. Obviously, the other respondents cannot be held accountable for false statement, if necessary, under Horner's verification. (18 U.S.C. §1621, *United States v. Seavy* (3rd Cir., 1950) 180 F. 2d 837.)

Therefore, if the proposed complaint is permitted to be filed, petitioners would be denied their rights

under Section 501 (b), since nobody could be held accountable if there are any false statements in the application or complaint.

CONCLUSION

This petition for writ of certiorari should be granted for the reasons herein stated.

Respectfully submitted,
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(Appendices Follow)

Appendix A

ORDER OF THE DISTRICT COURT

United States District Court
For the Northern District of California
Southern Division

Misc. No. 1122

LOUIS HORNER, JOHN L. CONNOLLY, VICTOR ROMERO, JAMES RIEMERS and HUGH BELL for the benefit of THE PACIFIC COAST DISTRICT OF NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, an unincorporated association,

Plaintiffs,

vs.

W. A. FERRON, HENRY A. BORELLO, W. H. BUTTRAM, ROBERT H. HORNE, C. W. JENKINS, HARRY LEWIS, R. H. ROBINSON, F. E. WALTON, C. BLACK, H. COLEMAN, S. R. FRANKS, GEORGE B. SALOVICH, FRODE ANDERSEN, FRANCIS H. ROGERS, CHEMICAL BANK NEW YORK TRUST COMPANY, a New York corporation, and FIRST DOE through TENTH DOE, inclusive,

Defendants.

ORDER DENYING APPLICATION AND MOTION TO FILE COMPLAINT

The application and motion of the above named prospective plaintiffs for leave to file a Complaint

against the above named prospective defendants under 29 U.S.C. §501 having been presented and argued on March 31, 1965, and the Court having read and considered the proposed Complaint together with the affidavits presented on behalf of the prospective parties, and oral and documentary evidence having been introduced and considered by the Court, and the matter having been submitted for ruling, the Court finds lack of good cause for commencing and bringing the action set forth in the proposed Complaint of the prospective plaintiffs above named, and therefore,

IT IS ORDERED that the application and motion of the prospective plaintiffs above named to file said Complaint and to commence the action set forth therein be, and the same is hereby, DENIED.

Dated: April 15, 1965.

George B. Harris,
United States District Judge.

Original Filed Apr. 15, 1965
Clerk, U.S. Dist. Court San Francisco.

DECISION AND ORDER OF THE COURT OF APPEALS

United States Court of Appeals
for the Ninth Circuit

LOUIS HORNER, JOHN L. CONNOLLY, VICTOR ROMERO, JAMES RIEMERS and HUGH BELL for the benefit of THE PACIFIC COAST DISTRICT OF NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, an unincorporated association,

Appellants,

vs.

W. A. FERRON, HENRY A. BORELLO, W. H. BUTTRAM, ROBERT H. HORNE, C. W. JENKINS, HARRY LEWIS, R. H. ROBINSON, F. E. WALTON, C. BLACK, H. COLEMAN, S. R. FRANKS, GEORGE B. SALOVICH, FRODE ANDERSEN, FRANCIS H. ROGERS, CHEMICAL BANK NEW YORK TRUST COMPANY, a New York corporation, and FIRST DOE through TENTH DOE, inclusive,

Appellees.

No. 20,120

[May 24, 1966]

Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: HAMLEY, MERRILL and ELY, Circuit Judges

HAMLEY, Circuit Judge:

The individual appellants herein are members of The Pacific Coast District of National Marine Engi-

neers' Beneficial Association (District): On behalf of the District, they wish to sue its officials and others, named as appellees, to obtain an accounting and a judgment for damages in the amount of forty thousand dollars. Their proposed claim is based upon the theory that the union officials have violated their statutory fiduciary duties, as declared in section 501(a) of the Labor Management Reporting and Disclosure Act of 1959.[1]

Section 501(b) of the Act provides that no such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown.[2] The prospective plaintiffs filed such an application, consisting of a verified complaint, a letter to the judge of the district court, and two "declarations." After an exchange of affidavits and memoranda, and two hearings at which oral testimony was received, the district court entered an order denying

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[1]73 Stat. 535, 29 U.S.C. § 501(a) (1964).

[2]Section 501(b) reads in part:

"(b) . . . When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte." 29 U.S.C. § 501(b) (1964).

the application, finding "lack of good cause" for commencing the action. This appeal followed.

A few days prior to the oral argument of this appeal, Louis Horner, the plaintiff who verified the application in the form of a complaint, died. We called for, and received, supplemental briefs bearing on the effect, if any, of Horner's death on the appeal and on the survival of the action.

We will first consider the issues raised by Horner's death. Appellees contend that the appeal has become "moot" because a proper verified complaint cannot now be filed pursuant to section 501(b). They claim that if the proposed complaint is allowed to be filed, they will be deprived of their rights under section 501(b) to hold the verifier accountable for any false allegations.

A reading of section 501(b), however, reveals that the verification requirement pertains to the "application" for leave to file a complaint and not to the actual pleading. In this case, the application, in the form of a complaint, was properly verified when it was presented to the district court; at that time, Horner was alive and accountable for any falsehoods. The verification requirement of section 501(b) has been fulfilled. In the absence of an express statutory mandate, neither the complaint, considered apart from its role as an application, nor any other pleadings in this matter need be verified or accompanied by affidavit. See Rule 11, Federal Rules of Civil Procedure.

Horner's death does not revoke the validity of the verified application filed in the district court. As-

suming, as appellees do, that Horner was acting as the agent of the other plaintiffs when he verified the application, his subsequent death does not deprive the remaining plaintiffs of the effectiveness of his acts performed while the agency relation existed.

Appellees further suggest that the cause of action asserted by Horner does not survive his death. But the authority most nearly in point supports the conclusion that the cause asserted by Horner, on behalf of the District, did not abate with his death. And this result is the same whether federal law (*Spring v. Webb,* D.C.Vt., 227 Fed. 481), or California law (Cal. Probate Code § 573), is applied. Certainly, with regard to the remaining plaintiffs, who stand ready and willing to carry on this litigation, there has been no abatement of the cause of action. See *Edwards v. Mercantile Trust Co.,* S.D.N.Y., 121 Fed. 203.

We hold that the death of Louis Horner does not abate or terminate this action, nor does it render the cause moot.[3]

The essential allegations of the complaint appellants seek to file are as follows: Prior to April 1, 1962, the marine engineers in the affected area (Pacific Coast and Hawaii) were represented by various local labor organizations. On May 1, 1959, the officials of these locals purported to execute a "Marine Engineers' Beneficial Association Officers' Retirement and

[3]It has been brought to our attention that subsequent to the oral argument of the appeal of this action, Mr. Ray Robinson, one of the defendants, died. Presumably, appellants will make an appropriate amendment to their complaint before it is filed, omitting this party.

Severance Plan" (Severance Plan) with appellee Chemical Bank New York Trust Company as trustee. The purpose of the plan was to provide financial benefits for the officials of the locals, including the individual appellees, upon retirement or severance from their positions. These officials caused the Severance Plan to be executed without any valid authorization.

Continuing with the allegations of the proposed complaint: The District was created about April 1, 1962, and since that date has undertaken the operations and activities formerly conducted by the locals referred to above. Commencing about April 15, 1962, the officials of the District, appellees herein, have caused funds of the District to be paid to appellee bank under the Severance Plan. These payments were and are without valid authorization. By so doing, these officials have violated their fiduciary obligations to the District and its members under section 501 of the Act and under the laws of the State of California. They have further violated these duties by causing themselves to be named as beneficiaries of the Severance Plan without any valid authorization.

It is also alleged in the proposed complaint: The constitution and by-laws of the District do not provide any adequate internal remedies. The prospective plaintiffs have requested the District, its Executive Committee and officers to take such action as might be necessary in order to recover for the District the above-described payments to the appellee bank. They have refused to do so. A reasonable time for such

action has now elapsed since the making of the requests.

The allegations of the complaint were explained, amplified or disputed in the affidavits and oral testimony received at the hearings before the district court. Appellees there advanced four reasons why the application for leave to file the complaint should be denied. Appellants argued in the district court, and contend here, that none of these reasons is adequate to support the order under review. Appellees, on the other hand, contend here not only that each such reason is individually sufficient to sustain the court order, but that there are also other reasons, not advanced in the district court, which in any event call for affirmance.

Before dealing with these matters some preliminary observations concerning the scope of application proceedings under section 501(b) are in order. The requirement of section 501(b) that a plaintiff in such an action show "good cause" before being entitled to file the complaint is intended as a safeguard to the affected union against harassing and vexatious litigation brought without merit or good faith. *Highway Truck Drivers and Helpers Local 107 v. Cohen,* E.D. Pa., 182 F.Supp. 608, 622, fn. 10, *aff'd,* 3 Cir., 284 F.2d 162.

The allegations of the verified complaint may be sufficient to enable the court to determine whether there is "good cause." See *Executive Board, Local 28, I.B.E.W., v. International Brotherhood of Electrical Workers,* D.Md., 184 F.Supp. 649, 653. Thus section

501(b) provides that such an application may be made ex parte. But the court may, on its own motion, call for a hearing, or may grant the defendant's motion for a hearing.[4]

At such a hearing, if one is called, the court may, if it chooses, look somewhat beyond the complaint in determining whether the plaintiff has made the "good cause" showing required by section 501(b). Thus if the defendant can establish, by undisputed affidavit, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or that the action cannot succeed because of the application of the principles of *res judicata* or collateral estoppel, or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application.

However, we think it inappropriate to consider, at such a hearing, defenses which require the resolution of complex questions of law going to the substance of the case. Defenses of this kind should be appraised only on motion for summary judgment or after a trial. Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope

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[4]In this case appellants did not seek ex parte consideration of their application but notified appellees of the time and place the application would be presented to the court. As before indicated, hearings were thereafter held.

of summary judgment procedure,[5] are *a fortiori,* beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken.[6]

Having in mind this limited scope of proceedings on a section 501(b) application, we turn to the consideration of whether the order of denial should be sustained. The district court did not indicate which one or more of the four reasons for denial advanced by appellees in that court, had been accepted as the basis for the order. Thus if any one of them was appropriate to be considered, and was adequate, the order should be affirmed.[7]

The first reason advanced by appellees in the district court why the application should be denied involves the principles of *res judicata* and collateral estoppel. Appellants had previously instituted an action (No. 41678) which is still pending in the same district court. In that action appellants are attempting to recover

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[5]See Rule 56(c), Federal Rules of Civil Procedure.

[6]Pre-trial discovery is not available to a plaintiff suing under section 501(b), until after leave to file the complaint has been granted.

[7]Findings of fact and conclusions of law were not necessary. However, where, as here, alternative grounds for action are urged upon the district court, it is of assistance to the appellate court, in reviewing such action, for the district court to state the specific grounds relied upon. While we could here remand so that this could be done, we elect not to do so.

funds paid into the Severance Plan prior to formation of the District, relief more limited than that which was sought in the complaint which they were not permitted to file. In the first action, appellants moved for leave to file an amended complaint in which they would have added the District and the National Marine Engineers' Beneficial Association as defendant. The district court denied the motion to amend, and no appeal from the denial was taken. Appellees, in resisting the application to file the complaint in the instant proceeding, contended that the refusal to permit the filing of the amended complaint in the first action was sufficient justification for the district court's determination that good cause for permitting the filing of the complaint in the present proceeding did not exist.[8]

We assume for present purposes that the identity of parties and subject matter was sufficient to give application to the doctrine of *res judicata* or collateral estoppel. Several grounds were urged upon the court in Action No. 41678 why the motion to file the amended complaint should be denied. That court appears not to have stated, in its order of denial, which of these grounds it was relying upon. This being the case, that order cannot be taken as *res judicata* as to any of the grounds urged. See *Scrofani v. Miami Rare Bird Farm, Inc.*, 5 Cir., 208 F.2d 461, 464. For the same

[8]This argument was urged in the district court but the controlling principle was there referred to as the "law of the case." This was probably due to the uncertainty that existed at the time of the first hearing on the instant application whether the proposed complaint was to be considered in Action No. 41678.

reason, such an order cannot work a collateral estoppel.

Moreover, one of the grounds urged upon the court for denying leave to file the amended complaint in Action No. 41678 was that appellants had not alleged that they had made the preliminary request of union officials to take remedial action, as required by section 501(b). Counsel for appellees thought this was probably the basis of the district court order.[9] This is a procedural ground which is capable of correction. If this was actually the ground on which the motion to file the amended complaint was denied it could not, by operation of the doctrine of *res judicata* or collateral estoppel, prevent appellants from correcting the procedural mistake in a subsequent and independent action, and this they have done. See *Bland v. Connally*, D.C. Cir., 293 F.2d 852, 855.

In any event, denial of the motion to file the amended complaint, made in Action No. 41678 which is still pending, was not a final and appealable order. See *Hancock Oil Co. v. Universal Oil Products Co.*, 9 Cir., 120 F.2d 959, 960; *National Machinery Co. v. Waterbury Farrel Foundry and Machine Co.*, 2 Cir., 290 F.2d 527, 528. Since the denial of that motion might yet be overturned in a future appeal in Action

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[9] At the first hearing on the instant application, counsel for appellees advised the court:

> ". . . I might state to the Court, when the matter came up initially, one of the reasons stated in opposition to permission to file the amended complaint was that at that time they had made no demand upon the union for action. In addition, there were four other matters which were pointed out to the Court which the Court did not reach at that time and they were that they did not exhaust their administrative remedies in the union itself."

No. 41678 (unless rendered moot by the present proceedings) that unreviewed order of denial could hardly serve as *res judicata* or work a collateral estoppel in this case.

The second reason advanced by appellees in the district court why the application should be denied was that the proposed complaint predicates invalidity of appellees' union activities only on lack of proper union authorization when the Severance Plan was established, but assuming this to be true the plan has, since then, been ratified by the union membership. Accordingly, appellees contended, appellants did not show "good cause" to bring the proceeding, as required by section 501(b).

No District-wide vote specifically referring to the Severance Plan has ever been taken. However, appellees argue that votes taken at five branch meetings held in San Francisco, Wilmington (California), Seattle and Portland, at which motions to direct union officials to take necessary action to recover union contributions to the Severance Plan, were defeated, or such action by other branches was concurred in, constituted implied ratification of the plan. Another branch vote relied upon, taken in San Francisco, was one approving action of the District's Executive Committee, authorizing contributions to the Severance Plan.

This defense presents a serious question of law, going to the merits of the case, as to whether District ratification may be implied from branch votes on motions not specifically addressed to the question of ratification. Moreover, genuine issues of fact must be

resolved before the merits of this defense can be determined. Appellants contended in the district court, and here, that there was inadequate disclosure of pertinent facts and that, on the contrary, it had been affirmatively misrepresented to the members that the plan had been validly authorized at its inception.[10] They also contended that appellee Ferron dominated and controlled the meetings at which such votes were taken. Accordingly, giving application to the principles announced above, this second reason advanced by appellees in the district court why the application should be denied could not, whatever its merits may ultimately be shown to be, warrant denial of the application.

The third reason advanced by appellees in the district court was that appellants must first exhaust all reasonable intra-organizational remedies before filing a section 501(b) application. The proposed complaint, appellees assert, makes no attempt to allege recourse to the "myriad" of remedies provided by the by-laws of the District, therefore, appellees argued, appellants did not show "good cause" to bring this proceeding.

It is a condition precedent to a suit under section 501(b), that the plaintiff, as a member of the labor organization, request that organization or its governing board or officers to sue or recover damages or secure an accounting or other appropriate relief from the asserted violations of fiduciary duties defined in section 501(a). The proposed complaint alleges fulfill-

[10]Ratification of a fiduciary's unauthorized acts cannot be effectuated unless there has been a full disclosure of the facts. See *Gaynor v. Buckley*, 9 Cir., 318 F.2d 432, 435; *Central Ry. Signal Co. v. Longden*, 7 Cir., 194 F.2d 310, 320.

ment of this condition precedent. Section 501(b) makes reference to no other intra-organizational remedies which must be pursued. It follows that the pursuit of other internal remedies which may be available need not be alleged to show "good cause," or proved to prevail on the merits. See *Holdeman v. Sheldon,* S.D.N.Y., 204 F.Supp. 890, 896, *aff'd,* 2 Cir., 311 F.2d 2.

The fourth reason advanced by appellees in the district court why the application should be denied was that the complaint does not conform to the requirements of Rule 23(b), Federal Rules of Civil Procedure, relating to secondary actions by shareholders. Therefore, appellees argued, appellants did not show "good cause" to bring this proceeding.

Rule 23(b) pertains to secondary actions brought by the shareholders of an incorporated or unincorporated association. It requires that in an action, brought to enforce a secondary right on the part of one or more such shareholders, the complaint shall contain certain averments. One of these is that the complaint shall set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making the effort. Appellees argued, in effect, that in failing to allege that they pursued available internal remedies, appellants failed to comply with this requirement of Rule 23(b).

Section 501(b), as we have said, requires no allegation or proof as to the pursuit of internal remedies

other than the making of the request referred to in that statute. This being so, Rule 23(b), which in any event relates only to "shareholders," and could therefore not include members of a labor organization, is inapplicable.

Appellees argue here, but did not argue in the district court, that the district court lacked subject-matter jurisdiction to entertain this proceeding on the merits and appellants therefore did not show "good cause" to bring it. This argument is predicated on the fact that the Severance Plan, which appellants say was invalidly adopted, was first established on May 1, 1959, and the Act under which the suit is proposed to be brought did not become effective until September 14, 1959.

If appellees were being charged with participating in the initial adoption of the Severance Plan in May, 1959, or with making payments thereunder prior to the effective date of the Act, this argument would have force. The Act is not to be applied retroactively in either criminal or civil proceedings. See *Woxberg v. United States,* 9 Cir., 329 F.2d 284, 292-293; *Holton v. McFarland,* D.C.D. Alaska, 215 F.Supp. 372, 376; *Flaherty v. McDonald,* D.C.S.D. Cal. 183 F.Supp. 300, 304.

Appellants, however, contend that the Severance Plan is invalid not because it was adopted in violation of the subsequently-enacted Act, but because it was not authorized in the manner required by the constitution, by-laws and other governing rules of the labor organizations which purported to adopt them. Moreover, appellants do not charge appellees with any mis-

feasance or malfeasance in connection with the adoption of the plan, or because of any payments made before the Act became effective. They charge only that, after the District was created on April 1, 1962, which was more than a year and a half after the Act became effective, appellees applied District funds under the plan and designated themselves as beneficiaries thereunder, and that this was improper and unauthorized because the plan had never been validly adopted.

Since the alleged misconduct occurred after enactment of the statute, the district court did not lack subject-matter jurisdiction to entertain this proceeding on the merits.

Appellees present several additional arguments in this court which they did not make in the district court. They contend that: (1) Louis Horner, who verified the proposed complaint and filed supporting papers was not a member in good standing of the District, and was a pensioner and not an active seaman; (2) of the four remaining individual appellants, only one, Hugh Bell, was an active seaman and the record indicates that he did not make any prior demand requesting union action; (3) the Severance Plan was properly adopted; and (4) the proposed complaint is stale and is barred by the statute of limitations.

We decline to consider these arguments, none of which go to jurisdiction, since they were not presented in the district court as grounds for denying the application.

Reversed.

JUDGMENT OF THE COURT OF APPEALS

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Tuesday, May 24, 1966

Before: HAMLEY, MERRILL and ELY, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

ORDER DENYING REHEARING IN THE COURT OF APPEALS

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Thursday, June 30, 1966

Before: HAMLEY, MERRILL and ELY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellees filed June 22, 1966 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Appendix B

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, AS AMENDED[1]

73 Stat. 519.

An Act

To provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Labor-Management Reporting and Disclosure Act of 1959."

Title V—Safeguards for Labor Organizations

Fiduciary Responsibility of Officers of Labor Organizations—(29 U.S.C. 501)

73 Stat. 535.

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance

[1]Public Law 257, 86th Cong. (73 Stat. 519-546), as amended by Public Law 216, 89th Cong. (79 Stat. 888).

with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified ap-

plication and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

FORMER RULE 23(b), FEDERAL RULES OF CIVIL PROCEDURE

Rule 23 (b) Secondary Action By Shareholders.

In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

RULE 23.1, FEDERAL RULES OF CIVIL PROCEDURE, AS AMENDED 1966

Rule 23.1 Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

History of Rule

Rule 23.1 was added in 1966. Its substance was formerly contained in original Rule 23(b) prior to the 1966 amendments completely revising and rewriting Rule 23 and adding Rules 23.1 and 23.2. The text of original Rule 23(b) is set out under Rule 23, *supra*.